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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
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WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re) ADVERSARY CASE NO. 04-90544-H11

TRI-NATIONAL DEVELOPMENT) CASE NO. 01-10964-H11
CORP.,)

Debtor.) MEMORANDUM DECISION

DOUGLAS P. WILSON, Chapter
11 Trustee of Tri-National
Development Corp.,)

Plaintiff,)

v.)

VIPER NETWORKS, INC., as
successor in interest to
TAIG VENTURES, INC.,)

Defendant.)

VIPER NETWORKS, INC., as
successor in interest to
TAIG VENTURES, INC.)

Counter-Complainant,)

v.)

TRI-NATIONAL DEVELOPMENT
CORPORATION (DOUGLAS P.
WILSON, Chapter 11 Trustee
of Tri-National Development
Corp.), and ROES 1 through
100,)

Counter-Defendant.)

1 Douglas P. Wilson (the "Trustee"), the Chapter 11 trustee of
2 Tri-National Development Corporation (the "Debtor"), filed his
3 complaint against Viper Networks, Inc. ("Viper") on December 27,
4 2004, seeking declaratory relief that Viper's purported return of
5 certain stock shares to its treasury violated the automatic stay
6 and damages for such violation under § 362(h). The Trustee also
7 seeks the turnover of the shares because they constitute estate
8 property.

9 Viper filed a counterclaim seeking specific performance of the
10 contract (the "Contract") between Debtor and Viper involving a
11 stock-for-land transaction. Alternatively, Viper seeks to rescind
12 the Contract because Debtor has yet to deliver title to the real
13 property to Viper.

14 The Trustee moves to dismiss the counterclaim filed by Viper
15 pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule
16 12(b)(6)"). With respect to both claims for relief, the Trustee
17 contends that Viper is not entitled to either specific performance
18 or rescission because both remedies fall within the scope of
19 § 101(5)(B).¹ Therefore, the Trustee contends that Viper has
20 nothing more than a general unsecured claim for damages for the
21 breach of the Contract against the Debtor's bankruptcy estate.

22 At issue is whether Viper's counterclaim should be dismissed
23 pursuant to Rule 12(b)(6) because its request for the equitable
24

25 ¹ Section 101(5)(B) defines a "claim" as the

26 right to an equitable remedy for breach of performance if
27 such breach gives rise to a right to payment, whether or
28 not such right to an equitable remedy is reduced to
judgment, fixed, contingent, matured, unmatured, disputed,
undisputed, secured, or unsecured.

1 remedies of specific performance and rescission fall within the
2 scope of § 101(5) (B) .

3 I.

4 FACTS

5 The following factual allegations appear to be undisputed and
6 will be assumed to be true for purposes of disposing of the
7 Trustee's motion.

8 The Debtor and Taig Ventures, Inc. ("Taig") entered into a
9 Contract involving the transfer of real property on or about
10 September 1, 1998. Pursuant to the Contract, Taig was to issue
11 restricted shares of its common stock in exchange for the Debtor
12 providing good and clean title to Taig of fifty (50) acres of real
13 property located in Baja, California, Mexico (the "Real Property")
14 known as the "Hills of Bajamar." According to the Trustee's
15 complaint, at the time of the execution of the Contract, the Debtor
16 was in the process of acquiring the real property through its
17 wholly-owned Mexican subsidiary corporation, Planificacion
18 Desarrollo Regaional Jatay, S.A. de C.V. ("Planificacion"), but had
19 not yet acquired title to the real property in its own name, or in
20 the name of Planificacion. The Trustee alleges that on December
21 22, 1998, despite the fact that the Debtor had not yet delivered
22 title to the Real Property, Taig did in fact issue and deliver the
23 shares of its common stock, in the form of Stock Certificate No.
24 2513.

25 Subsequent to entering into the Contract, through a series of
26 mergers, acquisitions and/or name changes, Taig became known as
27 Viper Networks, Inc. The Trustee alleges that on September 24,
28 2001 - after the filing of the Involuntary Case but before the

1 filing of the Voluntary Case, and despite the fact that the Debtor
2 had failed to deliver title to the Real Property — Viper issued
3 and delivered to the Debtor 400,000 shares of the common stock of
4 Viper in the form of Stock Certificate No. 3039 to replace the Taig
5 shares represented by Stock Certificate No. 2513. It is the
6 400,000 shares of Viper stock represented by Stock Certificate No.
7 3039 which are at issue in the complaint.

8 To date, the Debtor has yet to obtain title to the Real
9 Property. [See Trustee's Complaint ¶ 9]. The Trustee alleges that
10 "Debtor's inability to deliver title to the Real Property has thus
11 left the Defendant with a general unsecured claim for damages for
12 the breach of the Contract against the Debtor's bankruptcy estate."
13 Id. Nonetheless, the Trustee demanded that Viper's transfer agent
14 turn over the shares to him. Viper refused to turn over the shares
15 and purportedly cancelled the shares and returned them to its
16 treasury. Allegedly, as of December 13, 2004, the shares were
17 worth approximately \$108,000.²

18 II.

19 STANDARD OF LAW

20 The Trustee's Motion to Dismiss is governed by Rule 12(b)(6)
21 made applicable here by Federal Rule Bankruptcy Procedure 7012. A
22 motion to dismiss for failure to state a claim should only be
23 granted if it "appears beyond doubt that the plaintiff can prove no
24 set of facts in support of his claim which would entitle him to
25

26 ² Debtor listed its interest in the 400,000 shares of common stock received
27 from Viper as having a value of \$1,150,000 at the time of its voluntary petition
28 filed on October 23, 2001. Debtor also listed its 100% ownership in Planificacion
which "owned 600 acres of undeveloped land known as the Hills of Bajamar." See
Schedule "B".

1 relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2
2 L.Ed.2d 80 (1957). "Our review is based on the contents of the
3 complaint, the allegations of which we accept as true and construe
4 in the light most favorable to the plaintiff." Love v. United
5 States, 915 F.2d 1242, 1245 (9th Cir.1989) (citations omitted).

6 III.

7 DISCUSSION

8 A. IS THE CONTRACT EXECUTORY?

9 Viper submitted the Contract entitled "Agreement of Purchase
10 and Sale of Assets" with its supplemental brief filed on May 27,
11 2005.³ Taig and the Debtor entered into the Contract on
12 September 1, 1998. Besides the stock-for-land transaction, the
13 Contract also specified that Taig was to build a Communications
14 Facility on all or a portion of the Real Property in which the
15 Debtor would receive a 10% equity position. It is undisputed that
16 the Debtor's president, Michael Sunstein, signed the Contract on
17 behalf of the Debtor. It would appear that Debtor's interest in
18 the Contract then constitutes property of the estate. See 11
19 U.S.C. § 541(a)(1); see also In re Computer Communications, Inc.,
20 824 F.2d 725, 730 (9th Cir. 1987) (a contract falls within § 541

21
22 ³ Rule 12(b)(6) provides that if matters outside the complaint are presented
23 to and not excluded by the court, it should treat the motion to dismiss as a summary
24 judgment motion. See Rule 12(b); Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct.
25 1232, 31 L.Ed.2d 569 (1972). Although the Contract is not attached to Viper's
26 counterclaim, Viper's counterclaim discusses the Contract and its factual
27 allegations and claims for relief are expressly linked to and dependent upon the
28 Contract. Therefore, the Court need not treat the Trustee's Motion to Dismiss as
one for summary judgment since the Contract effectively merges into the pleadings
and this Court can review it in deciding a motion to dismiss. See Branch v.
Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose contents are alleged
in a complaint and whose authenticity no party questions, but which are not
physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
motion to dismiss.").

1 definition of property of the estate). Therefore, it is critical
2 to determine whether the purchase agreement is an "executory
3 contract" for purposes of assumption or rejection under § 365 of
4 the Bankruptcy Code. Neither the Trustee nor Viper has addressed
5 this issue.

6 There is no precise definition of what contracts are
7 executory. But, within the Ninth Circuit, the "Countryman"
8 definition is most frequently used in determining whether a
9 contract is executory for bankruptcy purposes. Under the
10 Countryman definition, a contract is executory if the obligations
11 of both parties are so far unperformed that the failure of either
12 party to complete performance would constitute a material breach
13 and thus excuse the performance of the other. In re Alexander, 670
14 F.2d 885, 886 (9th Cir. 1982) (citations omitted).⁴

15 Under this definition, the Contract was executory in nature
16 because it remained substantially unperformed. Although Viper
17 tendered the shares to the Debtor for payment of the purchase
18 price, "[t]he contract did not cease to be executory when there was
19 a tender of performance." Id. at 887. "Performance or the
20 rendering of performance, not just tender of performance, is
21

22 ⁴ The Contract in this adversary proceeding is similar to that in Alexander.
23 In Alexander, the debtor entered into a deposit receipt sales contract to sell her
24 house to the plaintiffs. The plaintiffs tendered full performance, but debtor
25 refused to convey title or surrender possession. The plaintiffs filed an action
26 for specific performance in state court. On the day of the trial, the debtor filed
27 her chapter 13 petition. The debtor's plan elected to reject the plaintiff's
28 contract for the sale of debtor's home and the plan was confirmed. Plaintiffs then
sought relief from stay to continue their action in state court. The debtor
contended that the contract was executory and could therefore be rejected. The
bankruptcy court concluded that the contract was not executory because the
plaintiff's had tendered performance. The district court affirmed. The Ninth
Circuit reversed finding that the contract did not cease to be executory when there
was a tender of performance.

1 required." Id. Further, Viper's predecessor Taig agreed to
2 develop a Communications Facility on all or a portion of the
3 property and agreed that Debtor would retain a 10% equity position
4 in the facility. On the Debtor's side, it had to give up
5 possession and convey title. Both parties therefore had material
6 obligations remaining under the Contract and it is clearly
7 executory.

8 **B. THE PREPETITION BREACH**

9 The Trustee contends in both his complaint (see ¶ 9) and his
10 Motion to Dismiss Viper's counterclaim that the Debtor's failure to
11 obtain title to the Real Property constitutes a prepetition breach.
12 While the Debtor may have breached the Contract prepetition, "the
13 fact of breach does not somehow convert the executory contract into
14 an executed contract...."

15 A material breach by a party to an executory
16 contract before the bankruptcy of either party
17 gives the other party a unilateral option to
18 treat his own obligations under the contract as
19 discharged and claim damages for the breach or
20 to waive the breach and treat the contract as
21 still in effect. This option of the
22 nondefaulting party is qualified only to the
23 extent that some provision of the contract or
24 some provision of the applicable nonbankruptcy
25 law gives to the defaulting party a right to
26 cure the default. Alexander, 670 F.2d at 887
27 n.1.

28 Therefore, Viper, the nondefaulting party, had the option to either
treat the obligations under the Contract as discharged and claim
damages for the breach or to waive the breach and treat the
Contract as still in effect. From the pleadings submitted in
connection with the Trustee's Motion to Dismiss, it appears that
Viper did not exercise its option to treat its obligations under
the Contract as discharged prepetition because it issued the

1 400,000 shares of stock in favor of the Debtor shortly after its
2 involuntary petition was filed, but before the filing of Debtor's
3 voluntary petition. The Contract has therefore remained executory
4 because any termination by Viper would be stayed under § 362(a).
5 See Computer Communications, 824 F.2d at 729 (9th Cir.1987)
6 (holding that even an unassumable executory contract would be
7 protected from termination by the automatic stay).

8 One court explained:

9 [T]he estate enjoys a rather privileged
10 position. From the moment of filing to the
11 moment of assumption or rejection, the non-
12 debtor party is held to be barred from
13 enforcing the contract and its terms. Of
14 course, if the nondebtor party performs on the
15 executory contract postpetition, it is entitled
16 to a postpetition administrative claim for the
reasonable value of such performance. Until
then, however, the status of the non-debtor
party's claims against the estate is held in
stasis, pending the estate's decision. In re
El Paso Refinery, L.P., 220 B.R. 37, 42 (Bankr.
W.D. Tex. 1998) (citations omitted).

17 C. VIPER'S COUNTERCLAIM FOR RECISSION IS ESSENTIALLY A REQUEST TO
18 TERMINATE THE CONTRACT

19 Viper's counterclaim for rescission does not fall within the
20 scope of § 101(5)(B) because it is essentially a request to
21 terminate the Contract.

22 [T]he effect of a rescission is as follows:
23 When a contract is rescinded it is
24 extinguished. Hence, if facts exist that
25 justify a rescission by one party, and he
26 declares a rescission in some effectual manner,
he terminates the contract. The contract
becomes [sic] a nullity; it and each of its
terms and provisions cease to be subsisting or
enforceable against the other party.

27 Holmes v. Steele, 269 Cal.App.2d 675, 677 (1969) (citation omitted).

28 Yet, the Trustee has not made the decision to assume or reject

1 the Contract in this bankruptcy case. See § 365(d)(2) (allowing the
2 trustee to assume or reject an executory contract at any time
3 before the confirmation of a plan). To allow Viper to terminate
4 the Contract at this juncture would undermine the estate's options.

5 Further, Viper has not filed a motion for relief from stay
6 which requires it to establish "cause" for relief. See
7 § 362(d)(1). According to one court, "a party to an executory
8 contract has no more right to 'relief from stay' to 'terminate' a
9 contract with the estate than does any other unsecured creditor
10 whose contract (executory or not) has been breached." El Paso
11 Refinery, 220 B.R. at 44.

12 Indeed, when one thinks about it, the 'relief
13 from stay' option is not a true alternative to
14 the assumption or rejection choice framed by
15 § 365 in any event. At the hearing on such a
16 motion, the non-debtor party must establish
17 'cause' for relief from stay, whereupon the
18 estate must offer 'adequate protection' to the
19 petitioning creditor. What 'cause' can the
20 non-debtor party offer in the usual executory
21 contract situation, other than a failure of
22 performance on the part of either the pre-
petition debtor or the post-petition estate?
And if the 'cause' in question is the 'pre-
petition breach' by the debtor, then no more
cause has been shown than could be mustered by
any unsecured creditor. Unsecured creditors
cannot obtain relief from stay to pursue their
claims against either the estate or the debtor
based solely upon the existence of an
outstanding pre-petition default which remains
unsatisfied. Id.

23 D. SECTION 365(j) PROVIDES SPECIAL TREATMENT TO NONDEBTOR
24 PURCHASERS UNDER AN EXECUTORY LAND SALE CONTRACT

25 Section 365(j) provides in relevant part:

26 [A] party whose executory contract to purchase
27 real property from the debtor is rejected and
28 under which such party is not in possession,
has a lien on the interest of the debtor in
such property for the recovery of any portion

1 of the purchase price that such purchaser or
2 party has paid.

3 Under this provision and the facts of this case, Viper is granted
4 protection in the form of a lien on the property for the amount of
5 the purchase price paid under the Contract. Viper will also have a
6 claim for any rejection damages. These are the only remedies
7 available to Viper - a lien under § 365(j) on the estate's property
8 equal to the purchase price tendered and any claim it can prove for
9 breach damages pursuant to § 502(g).

10 E. SPECIFIC PERFORMANCE

11 The Court has previously ruled at the hearing on this matter
12 that Viper would not be entitled to specific performance since it
13 had the alternative right to payment of its damages for the breach
14 of its contract rights under § 101(5)(B). Viper conceded as much
15 in its opposition to the Trustee's motion. See Viper's Opposition
16 5:25-26.

17 IV.

18 CONCLUSION

19 The Trustee's Motion to Dismiss with respect to Viper's
20 counterclaim for specific performance and rescission is granted for
21 the reasons set forth herein.

22 This Memorandum Decision constitutes findings of fact and
23 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure
24 7052. Attorneys for the Trustee are directed to file with this
25 Court an order in conformance with this Memorandum Decision within
26 ten (10) days from the date of entry thereof.

27 Dated: June 15, 2005

28 
JOHN J. HARGROVE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In re:

Bankruptcy Case No. 01-10964-H11
Adversary Proceeding Case No: 04-90544-H11

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

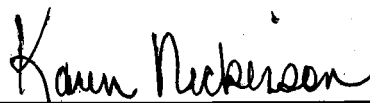
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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on June 15, 2005.



Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove